



Fondo & 2 others v Commission for Human Rights and Justice (Civil Application 48 of 2021) [2023] KECA 442 (KLR) (14 April 2023) (Ruling)

Neutral citation: [2023] KECA 442 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 48 OF 2021
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
APRIL 14, 2023**

BETWEEN

MICHELLE BIBI FONDO 1ST APPLICANT

H.E GOVERNOR, KILIFI COUNTY 2ND APPLICANT

PUBLIC SERVICE BOARD, KILIFI COUNTY GOVERNMENT 3RD APPLICANT

AND

COMMISSION FOR HUMAN RIGHTS AND JUSTICE RESPONDENT

(An application to strike out a Notice of Appeal dated 15th March, 2021, lodged on 16th March, 2021 and served on 2nd June, 2021 and the entire Record of Appeal dated 28th June, 2021 and lodged on 29th June, 2021 against the judgement delivered by Byram Ongaya, J on 12th March, 2021 in ELRC Petition No. E001 of 2020)

RULING

1. The 1st and 2nd applicants in the Notice of Motion application dated 29th July 2021 brought pursuant to Rules 3, 42, 75(2), 77(1) and 84 of the Court of Record Rules 2010 [now Rules 3, 44, 77 (2), 79 (1) and 86 of the Court of Record Rules 2022, hereinafter Rules] as well as Section 57 of the Interpretation and General Provisions Act. The application seeks, first the striking out of the Notice of Appeal dated 15th March 2021 and lodged on 16th March 2021 and served on 2nd June 2021. Secondly, it seeks the striking out of the entire Record of Appeal dated 28th June 2021 and lodged on 29th June 2021, served upon the 1st and 2nd applicants on 30th June 2021. It also seeks costs of the application.
2. The background to the appeal stems from a Constitutional Petition that challenged the constitutionality, propriety and legality of the appointment, swearing in and assumption to office of County Attorney of the 1st applicant. The grounds of the challenge were the absence of a declaration



- of vacancy of the office of the County Attorney; the failure to conduct interviews and non-compliance with Section 68 of the County Attorney Act.
3. The Court, in its judgment delivered on the 12th March, 2021 [Byrum Ongaya, J.] found that the respondent failed to establish the alleged violations of the constitutional provisions. The ELRC ordered the correction of the 1st applicant's appointment letter to reflect that, "You will continue in service as County Attorney, County of Kilifi, for a term commensurate to the term of the current Governor, or, until lapsing of six years from 27.07.2020, whichever comes first".
 4. The respondent was dissatisfied with the said decision and filed a Notice of Appeal dated 15th March 2021 and lodged in court on 16th March 2021. The Memorandum of Appeal faulted the learned ELRC Judge for finding that the actions of the 3rd applicant in the recruitment of the 1st applicant, were within the law.
 5. The grounds for the application are that the impugned Notice of Appeal was filed by a firm of advocates that was not on record for any party to the proceedings in the ELRC; that the Notice of Appeal was served outside the 7 days period provided for under Rule 79(1) of the Rules. Counsel also took issue with the filing and lodging of the subject Record of Appeal outside the 60 days provided for under Rule 86 of the Rules, in the absence of an application to extend time. Counsel further challenged the contents of the subject Record of Record for non-conformity with Rule 91 of the Rules; that the record contains no index, relevant pleadings, judgement and order, copy of certified order or decree and letter bespeaking proceedings.
 6. The affidavit sworn by Michelle Bibi Fondo in support of the application reiterated the grounds on the face of the Notice of motion.
 7. Submissions dated 3rd October 2022 in support of the application were filed by Munyao, Muthama & Kashindi Advocates for the 1st and 2nd applicants. The application raises 4 issues being firstly, the late service of the Notice of Record; secondly the authorship of the Notice of Record by a firm of advocates not on record in the ELRC; thirdly the late filing of and service of the Record of Appeal; and finally, the non-compliance with Rule 87 of the 2010 Rules of this court.
 8. On the issue of late service of the Notice of Record, counsel placed reliance on the case of *Daniel Nkirimpa Monirei vs. Sayiale Ole Koilel & 4 Others* (2016) eKLR, and urged that the impugned Notice be struck out for the fatal procedural infraction. On the issue of late filing and service of the Record of Appeal, counsel cited Rule 84(1) of the Rules of this court and the case of *Mistry Premji Ganji (Investments) Limited vs. Kenya National Highways Authority* (2019) eKLR, for the proposition on the fatality in late lodgment and service of the Record of Appeal. On the issue of the firm of advocates who authored and lodged the Notice and Record of Appeal, counsel urged that there was need for compliance with Order 9 Rule 9 of the *Civil Procedure Rules* 2010.
 9. The respondent was served with the application, through its counsel who filed the impugned Notice and Record of Appeal. No submissions were filed or a replying affidavit in response to the application. The application is therefore unopposed.
 10. When the application was called out for virtual hearing on the 11th October 2022, present for the 1st and 2nd applicants was learned counsel Ms. Gitao, while learned counsel Mr. Njoroge Mwangi was present for the 3rd applicant. There was no appearance for the respondent despite service of the hearing notice sent through the email of its counsel on record in this appeal.
 11. Ms. Gitao for the 1st and 2nd applicants relied on her written submissions dated 3rd October 2022, together with the list and bundle of authorities of even date. Counsel highlighted her submissions, and



urged that the application was dated 29th July 2021 and sought to strike out the Notice of Appeal and the Record of Appeal filed by the respondent on the 15th March 2021 and 29th June 2021 respectively, for being filed outside the timelines prescribed under the Rule.

12. Mr. Mwangi Njoroge for the 3rd applicant stated that they had not filed any papers but that they were in support of the application.
13. We have considered this application, the affidavit sworn in support of the application with the annexures thereto, together with the submissions relied upon by the 1st and 2nd applicants, both oral and written. Our invitation to intervene on behalf of the applicants has been invoked under the provisions of law cited in the heading of the application. The substantive provisions falling for interrogation are Rule 79 (1) as read with Rule 77 (2), and Rule 86 as read with Rule 85 of the Rules.
14. Rule 77 is explicit that a party aggrieved by a decision and desiring to appeal against such a decision has to lodge a notice of appeal within fourteen (14) days of the decision which, in the instant application was 22nd March 2021. It is common ground that the impugned notice of appeal was lodged within the timelines stipulated in the said Rule. It was however not served upon the applicants within the seven (7) days of its being lodged. It was served on 2nd June 2021, which was 82 days outside the timeline stipulated in Rule 77(1) & (2) which provides:

“77.

- (1) A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court. Notice of appeal.
2. Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.”

15. And Rule 79 (1) of the Rules provides:

“79.

- (1) An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal: Service of notice of appeal on persons affected.

Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.”

16. This Court has made pronouncements on the noncompliance with the timelines within which to serve a notice of appeal, we adopt the position taken by the Court in *Daniel Nkirimpa Monirei vs. Sayialele ole Koilele & 4 Others* [2016] eKLR, wherein it stated that:

“Whichever way, one looks at it, there was no service of the Notice of Appeal on the applicant. The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet, as the same has been escalated to another level.



This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77 (1) of the Court of Appeal Rules is couched in mandatory terms.”

17. The respondent did not file any responses to this application. We also note that it has not taken any remedial procedural steps to salvage their undisputed faulty processes as soon as applicants raised the complaints against it. Its inaction is therefore inexcusable especially when the Court in the said authorities explicitly stated that Rules of procedures are not for cosmetic value but meant to aid the Court in the exercise of its mandate under the said Rules in not only an orderly but also in a predictable manner. [See *The Board of Trustees of Local Authorities Provident Fund & another vs. Kenya County Government Workers Union & 67 others* Nrb Civil Application No. E248 of 2020].
18. Regarding the Record of Appeal, the averments in the supporting affidavit to this application, and annexures attached therein, are clear the Record of Appeal is dated 28th June 2021, was lodged on the 29th June 2021 and served on the 30th June 2021. This was more than 60 days from the date of the filing of the Notice of Appeal. To be specific, the Record of Appeal was filed 104 days out of time. In that regard, Rules 85 and 86 read as follows:

“ 85.

- (1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the Court may, on its own motion or on application by any other party, make such order.

Effect of default in instituting appeal.

- (2) The party in default under sub-rule (1) shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.

86. A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground

- a. that no appeal lies; or
- b. that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be.”

19. It is trite that whether or not a Record of Appeal has been filed on time goes to the jurisdiction of the Court, and there are numerous cases on this point. We shall cite only one of the cases, [Patrick Kiruja](#)



Kitbinji vs. Victor Mugira Marete [2015] eKLR, where this Court stated that whether or not an appeal is filed on time is a fundamental issue as it goes to the jurisdiction of the Court.

Second, that the Court only has jurisdiction to entertain appeals filed within the requisite time and or appeals filed out of time but with the leave of the Court.

20. The respondent did not attempt to explain the reasons for the delay as it filed no responses. Furthermore, it has not been drawn to our attention the existence of any application for extension of time to file the Record, or the Notice of Appeal. as was held in the case cited herein above, of Daniel Nkirimpa Monirei vs. Sayialel Ole Koilel & 4 Others, supra, any appeal filed out of time without leave is for striking out.
21. The last issue raised was in regard to the competence of the firm of Mkan & Company Advocates on the ground the firm had not represented any party in the ELRC, and having not filed any notice to come on record, or of appointment, any document filed by the firm is incompetent pursuant to the Civil Procedure Rules. First of all, this Court has its own rules and the Civil Procedure Rules do not apply. Conversely, there is nothing in the rules of this Court that require an advocate who represented a party in the lower court must continue to represent that party before this Court, absent a notice of change of advocates. Proceedings before this Court are, for purposes of representation, distinct from those in the lower court. See Mary Nchekei Paul vs. Francis Mundia Ruga [2019] eKLR and also Oscar Gitbanji Mburu vs. Faith Githongo & another [2021] eKLR.
22. We have come to the conclusion that the Notice of Appeal and the Record of Appeal filed herein by the respondent on the 16th March 2021 and 30th June 2021 respectively, are fatally defective and are for striking out. Accordingly, the Notice of Motion dated 29th July, 2021 is allowed as prayed in the following terms:
 1. The Notice of Appeal dated 15th March 2021 and lodged on the 16th March 2021 be and is hereby struck out.
 2. The Record of Appeal dated 28th of June 2021 and lodged on the 30th June 2021 be and is hereby struck out.
 3. The respondent shall pay the costs of this application.

DATED AND DELIVERED AT MOMBASA THIS 14TH DAY OF APRIL 2023

S. GATEMBU KAIRU (FCI Arb.)

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed



DEPUTY REGISTRAR

